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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 534

NATIONAL THEATRES CORPORATION,
Petitioner,

v.

BERTHA BUILDING CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF OF RESPONDENT IN OPPOSITION

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January 14, 1960.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondent respectfully submits that the petition for a writ of certiorari should be denied inasmuch as (a) the question presented relates only to a narrow and non-recurring problem of state law which was correctly resolved by the court below and (b) the judgment below is interlocutory in nature and creates no extraordinary situation warranting review by this Court at this juncture of the case.

(a) The correct resolution of the state law question

This action for treble damages under the federal antitrust laws was brought in a federal district court in New York. In the present posture of the case, the only question at issue is a determination of which limitations provision of the New York Civil Practice Act is applicable to this action—Section 48(2), the six-year statute relative to "a liability created by statute", or Section 49(3), the three-year statute respecting any "action upon a statute for a penalty or forfeiture where the action is given to the person aggrieved." The Court of Appeals below, after a thorough examination of relevant New York authorities, concluded that on the facts of this case the six-year statute, Section 48(2), was the applicable one and hence that this action was not barred insofar as New York limitations law was concerned. 269 F. 2d 785.

In so holding, the Court of Appeals has rendered no decision warranting the invocation of this Court's discretionary review power. No question is raised as to whether state or federal limitations law should be applied. *Cf. Guaranty Trust Co. v. York*, 326 U. S. 99. Nor is any issue created as to whether the limitations law of New York rather than that of some other state is to be applied. *Cf. Wells v. Simonds Abrasive Co.*, 345 U. S. 514. Petitioner concedes, moreover, that there is no problem here concerning any "conflict among the Circuits in interpreting a purely federal question arising under the antitrust laws." Pet. 20.

All that the Court of Appeals has done here is to give the New York limitations statutes the same interpretation and effect that they would have received in the state courts of New York. The court below has manifested scrupulous deference to the relevant

New York statutes and the New York decisions interpreting those statutes; and it has displayed unmistakable care in applying those statutes in light of the particular facts of this case. Petitioner's only complaint is its assertion that the court "has decided an important state question in a way conflicting with applicable state law." Pet. 20. Such a claim, in the context of this case, completely ignores the settled rule of this Court that, in considering certiorari petitions, "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston* v. *Dwyer*, 322 U. S. 232, 237. See also *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 534.

Petitioner's insistence that the Court of Appeals acted at variance with the law of New York is refuted by the most recent and relevant New York decision discussed in the opinion below, *Sicolo* v. *Prudential Savings Bank of Brooklyn*, 5 N. Y. 2d 254. The New York Court of Appeals in the *Sicolo* case held that a statutory cause of action for civil damages brought by a private individual—which is clearly the nature of a treble-damage action under the federal antitrust laws—is remedial rather than penal so as to render the six-year limitations provision of Section 48(2) applicable. Such has been the consistent view of the New York courts with reference to statutory actions for civil damages or compensation. See *Walsh* v. *515 Madison Ave. Corp.*, 181 Misc. 219, aff'd 293 N. Y. 826; *Drenne* v. *Mutual Life Ins. Co.*, 42 N. Y. Supp. 2d 259; *Corcoran* v. *Nelson-Towers Realty Corp.*, 42 N. Y. Supp. 2d 265; *Cox* v. *Lykes Brothers*, 237 N. Y. 376; *Schineck* v. *386 Fourth Ave. Corp.*, 182 Misc. 1038. Other fed-

eral courts applying New York limitations law have reached identical conclusions. *Leonia Amusement Corp.* v. *Loew's Inc.*, 117 F. Supp. 747 (S. D. N. Y.); *LaGuardia* v. *Austin-Bliss Tire Co.*, 41 F. Supp. 678 (S. D. N. Y.); *Asselta* v. *149 Madison Avenue Corp.*, 65 F. Supp. 385 (S. D. N. Y.), aff'd 156 F. 2d 139 (C. A. 2), aff'd 331 U. S. 199.

Petitioner's quarrel with the holding below stems from its mistaken belief that a treble damage action under the antitrust laws is designed primarily to punish the wrongdoer rather than to redress injuries suffered by the private plaintiff. No New York authorities directly relevant to such an interpretation of the antitrust laws are cited in the petition. And the general proposition that such an action for treble damages is in the nature of a penalty was long ago discarded by this Court in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, holding such an action to be non-penal so as to make inapplicable a federal limitations statute for penalties. See *Cox* v. *Lykes Brothers*, 237 N. Y. 376, 379-380, for a New York application of the *Chattanooga* ruling. More recently this Court in *Koller* v. *United States*, 359 U. S. 309, summarily affirmed a lower court opinion, *United States* v. *Doman*, 255 F. 2d 865 (C. A. 3), which had held that a civil suit for compensatory damages under the Surplus Property Act was not an action for a penalty within the meaning of the federal limitations statute relating to penalties.

The petition thus resolves itself into a mere effort to have this Court review the concurrent and correct determinations of the two courts below applying the pertinent New York limitations law. Moreover, the importance and the very existence of this problem of

applying state limitations statutes to suits under the federal antitrust laws are rapidly approaching the vanishing point. The instant case arose before 1955, the year when Congress amended the antitrust laws to provide a uniform federal limitations period of four years after the accrual of a treble damage cause of action. 69 Stat. 283, 15 U. S. C. A. § 16. Thus all actions accruing since the effective date of that amendment are no longer controlled by state statutes of limitations. The problem raised by this case will soon be of historic interest only.

Petitioner's claim (Pet. 21, Ex. A) that the issue raised by the petition affects at least nine other antitrust treble damage actions now pending does not serve to augment the importance of that issue. The court below, by its correct analysis of the New York law, has provided an authoritative guide for the resolution of the limitations issue in those nine other cases involving the New York law. Nothing further need be added by this Court.

(b) The interlocutory nature of the judgment

An indisputable fact at this posture of the case is the interlocutory nature of the judgment below. As set forth in the opinion below and in the petition, the case was remanded earlier from the Court of Appeals to the District Court for a jury trial on the issue of whether the action was barred by the California three-year statute of limitations. Petitioner thereupon filed a motion for summary judgment dismissing the complaint as barred by the three-year New York statute of limitations. The District Court denied the motion. Pet. 9a-24a. Leave to appeal was granted under the Interlocutory Appeals Act. 28 U. S. C. A. § 1292(b).

The Court of Appeals then affirmed the denial of the motion for summary judgment.

The judgment entered below is thus non-final in every sense of the word. It merely affirmed an interlocutory order of the District Court which in no way put an end to the case. And it is a judgment which is not prejudicial to a renewal of the point in issue once a final judgment against petitioner is rendered. See *Cohen* v. *Beneficial Loan Co.*, 337 U. S. 541, 546.

As this Court has stated, "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick* v. *United States*, 309 U. S. 323, 324-325. This factor of finality is likewise relevant to the issuance of a writ of certiorari. This Court "should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 384.

Petitioner has made no suggestion that denial of certiorari at this juncture would "practically defeat the right to any review at all" at a later date or that "extraordinary inconvenience and embarrassment in the conduct of the cause" would result. And the fact that the interlocutory order of the District Court was reviewed by the Court of Appeals pursuant to the Interlocutory Appeals Act gives the petition no greater weight. Nothing in that statute or its legislative history indicates any Congressional mandate to the Court to depart from the usual rule respecting review of in-

terlocutory orders. And where, as here, the judgment respecting the interlocutory order turns solely upon an interpretation and application of pertinent state law and raises no other issue of general importance no reason for granting the writ of certiorari is apparent.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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